SUPREME COURT, U. S.

OCT 24 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 686

ROBERT WILBUR BALL, Petitioner

vs.

THE STATE OF FLORIDA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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Petitioner prays that a writ of certiorari issue to review the opinon of the District Court of Appeal of Florida, Third District filed March 5, 1968, as affirmed by the Order Denying Rehearing filed March 22, 1968, and Denial of Petition for Writ of Certiorari by the Supreme Court of Florida on July 23, 1968.

OPINIONS BELOW

Adjudication and sentence were entered by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, on December 6, 1966, and recorded in Circuit Court Minute Book No. 780 at Page 167, 168.

The opinion of the District Court of Appeal, Third District was filed March 5, 1968, and is recorded in Minute Book 25 at Page 138. Rehearing was denied on March 22, 1968. Denial of Rehearing is recorded at Minute Book 25, Page 233. The opinion of the District Court of Appeal of Florida, Third District is reported at 207 So.2d 492. Petition for Writ of Certiorari was denied by the Supreme Court of Florida on July 23, 1968.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) because a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States, was denied by the District Court of Appeal of Florida, Third District. Jurisdiction is also invoked under Rule 19(1)(a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

I.

WHETHER DUE PROCESS OF LAW IS DENIED WHEN A SECOND DEGREE MURDER CONVICTION IS RETURNED AND SENTENCE IS IMPOSED THEREON ALTHOUGH INDICTMENT WAS FOR FIRST DEGREE MURDER AND THE EVIDENCE WAS SUCH AS TO MAKE SECOND DEGREE MURDER IMPOSSIBLE.

II.

WHETHER DUE PROCESS OF LAW IS AFFORDED PETITIONER WHEN A CONSOLIDATED TRIAL IS HELD ON TWO SEPARATE INDICTMENTS FOR MURDER AND THE JURY IS INSTRUCTED BY THE COURT THAT IF THEY FOUND THE DEFENDANT GUILTY OF EITHER OR BOTH OF THE CRIMES THE VERDICT WOULD BE GUILTY.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Constitution of the United States - Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 Revised Rules of the Supreme Court of the United States Rule 19. Considerations governing review on certiorari

1 (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Florida Statutes - 782.04

(1) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when comitted in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping shall be murder in the first degree, and shall be punishable by death.

(2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punished by

imprisonment in the state prison for life, or for any number of years not less than twenty years.

Florida Statutes - 919.14

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

STATEMENT OF THE CASE

ROBERT WILBUR BALL married REGINA DARLENE BALL in North Miami Beach, Florida in 1961. He adopted her child in 1964. The couple's marital difficulties led to separations, the longest for a month, but each time they reunited. In December of 1964, REGINA DARLENE BALL filed a suit for divorce. ROBERT BALL continued to see his wife and son for dinner and overnight visits.

On August 1, 1966, at his wife's invitation, BALL entered her house and found DE LLOYD D. NASH and his wife nude in bed. BALL had brought a 38 caliber gun. NASH also had a 38 caliber gun. Gunfire was exchanged;

both guns were fired; BALL was wounded and his wife and NASH were killed.

In response to charges for both homicides, Petitioner asserted that he had fired in self defense.

On March 8, 1968, grand jury indictments for first degree murder were filed charging ROBERT WILBUR BALL with effecting the deaths by murder on August 1, 1965, of DE LLOYD D. NASH and REGINA DARLENE BALL. BALL entered pleas of not guilty.

Trial by jury was held and the jury verdicts finding ROBERT WILBUR BALL guilty of murder in the second degree on each charge were filed. An appeal was taken to the District Court of Appeal, Third District of the State of Florida. The opinion of that court affirming the judgments of conviction are appended. Petition for Writ of Certiorari filed in the Supreme Court of Florida was denied. That order of denial is also appended.

HOW THE FEDERAL QUESTION WAS RAISED

The first point was raised at the trial level by objections. It was also raised by Motions for Directed Verdict and Motion for New Trial. All objections and motions were denied. It was raised by Assignments of Error and argument in the appellate court.

The second point was raised for the first time in the District Court of Appeal, Third District and also raised in Petition for Writ of Ceriorari in the Supreme Court of Florida.

REASONS FOR GRANTING THE WRIT

QUESTION I

WHETHER DUE PROCESS OF LAW IS DENIED WHEN A SECOND DEGREE MURDER CONVICTION IS RETURNED AND SENTENCE IS IMPOSED THEREON ALTHOUGH INDICTMENT WAS FOR FIRST DEGREE MURDER AND THE EVIDENCE WAS SUCH AS TO MAKE SECOND DEGREE MURDER IMPOSSIBLE.

In this case ROBERT WILBUR BALL testified that he shot in self defense. He swore that NASH had started shooting at him and that he, BALL, then returned the fire. That statement made at the trial is without contradiction. As a result of that testimony Petitioner contends that the jury had but two choices. It either believed his testimony or it did not believe his testimony. Although other expert evidence was presented seeking to establish which bullets resulted in the death of Mrs. Ball and Nash, no other evidence in any way involved the sequence of shooting. BALL's testimony was material and could not be ignored.

In Mayo v. State, (Fla.) 71 So.2d 899, it was directly held that the defendant's version of a homicide could not be ignored

where there was an absence of other evidence sufficient to contradict his explanation. In Holton v. State. 87 (Fla.) 65, 99 So. 254, the Supreme Court of Florida reversed a second degree conviction since the statement given by defendant in that case required a conviction of first degree murder or acquittal. The record could not support a second degree conviction. In this case the record can not support a second degree conviction. BALL clearly testified that he shot at the victims. There was no accident involved. As stated in Holton, supra, his statement to the jury was a practical confession of murder in the first degree unless the jury believed his story. The rejection of murder in the first degree by the jury requires the conclusion that it was not convinced beyond a reasonable doubt that BALL fired first.

The only factual question in the case material to this proceeding is whether BALL fired first or second. If he fired first, first degree conviction was required. If he fired second, acquittal was required and second degree conviction could not stand.

In Green v. United States, 218, F.2d 856 before this Court on other grounds cited in Green v. United States, 355 U.S. 184, 78 S. Ct. 221 (1957), the defendant was convicted of arson and second degree murder. The case was reversed upon the grounds present here. The Court stated among other things:

"In the present case, as in the Goodall case, all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else. Hence there was no reason for a second degree instruction, and giving it was at least technically erroneous."

See also Goodal v. United States, 180 F.2d 397.

QUESTION II

WHETHER DUE PROCESS OF LAW IS AFFORDED PETITIONER WHEN A CONSOLIDATED TRIAL IS HELD ON TWO SEPARATE INDICTMENTS FOR MURDER AND THE JURY IS INSTRUCTED BY THE COURT THAT IF THEY FOUND THE DEFENDANT GUILTY OF EITHER OR BOTH OF THE CRIMES THE VERDICT WOULD BE GUILTY.

No on can say from the charges what the jury actually found in this case. It is impossible to say whether the jury found BALL guilty of shooting NASH, whether the jury found BALL guilty of shooting Mrs. Ball or whether the jury found BALL guilty of shooting both. It is also possible that the jury believed that BALL killed NASH in self defense.

There were two separate indictments. Both cases were consolidated for the purpose of trial. Clearly BALL could have been guilty

of one charge and innocent of the other or innocent in both cases. It is the contention of Petitioner that a fair trial was denied in the absence of clear instructions to the jury explaining the various possibilities. Instead the Court charged the jury to find BALL guilty if it believed he was guilty of either or both of the crimes. See Appendix 8A, 9A.

Probably the Court felt that the jury knew that it had the right to acquit if it did not believe BALL was guilty in both cases, but no one can say that the jury understood that for, to compound the difficulty, the Court did not charge conversely that if the jury believed that he was innocent on either or both indictments, they should return a verdict of not guilty.

Petitioner finds no authority directly on point in support of this position other than the clear, inescapable, logical conclusion that the Court's instructions were confusing on a material point. The point becomes more important since the jury could well have believed that self defense existed with NASH but not with Mrs. Ball and were not told what the legal effects of that conclusion would be.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted so that

record may be reviewed in its entirety.

MILTON E. GRUSMARK
1674 Meridian Avenue
Miami Beach, Florida
Attorneys for Petitioner

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, was mailed to HON. EARL FAIRCLOTH, Attorney General, 1350 N. W. 12th Avenue, Miami, Florida, this_____day of October, 1968.

Milton E. Grusmark

APPENDIX A
Not Final Until Time Expires To File Rehearing Petition And, If Filed, Disposed Of

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term,A.D. 1968

Case No. 66-1041

ROBERT WILBUR BALL, Appellant,

vs.

THE STATE OF FLORIDA, Appellee.

Opinion Filed March 5, 1968

An Appeal from the Circuit Court for Dade County, Francis J. Christie, Judge.

Robert O. Collins (Hollywood); Milton E. Grusmark and Natalie Baskin, for appellant.

Earl Faircloth, Attorney General and Jesse J. McCrary, Jr., Assistant Attorney General, for appellee.

Before Charles Carroll, C.J., and Pearson and Hendry, JJ.

Per Curiam.

Appellant was indicted for first degree murder of his estranged wife and her lover. As to each homicide he was found by a jury to be guilty of second degree murder, was so adjudged and sentenced to life imprisonment.

On appeal it is contended the evidence

was insufficient to overcome the presumption of defendant's innocence and to disprove self-defense. We hold the contention is without merit. Examination of the record discloses there was sufficient competent evidence to sustain the verdicts. No useful purpose would be served by detailing the evidence here.

We have considered, in the light of the record and briefs, the appellant's contention of errors at the trial consisting of rulings on admissibility of evidence and of photographs, and we find no prejudicial error.

On the further contention that the trial court committed error by commenting on the evidence, and in failing to "define all elements of homicide" in the charges, we hold no reversible error is shown. Comments of the court as alluded to were not specified. See Reddit v. State, Fla. 1955, 84 So.2d 317. The court charged the jury on the degrees of homicide, and the charge set forth the elements of each offense. No particular definitions or wording of definitions thereof were requested to be charged. See Webster v. State, 141 Fla. 374, 193 So. 303.

No reversible error having been shown, the judgments are affirmed.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1968

Case No. 66-1041

ROBERT WILBUR BALL, Appellant,

vs.

THE STATE OF FLORIDA, Appellee.

Opinion Filed March 22, 1968

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

Clerk District Court of
Appeal, Third District

cc: Milton E. Grusmark
Robert O. Collins
Jesse J. McCrary, Jr.

/m

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE, COUNTY, FLORIDA)

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

July Term, A.D. 1968

Opinion Filed Tuesday, July 23, 1968

Case No. 37.428

DISTRICT COURT OF APPEAL
THIRD DISTRICT

ROBERT WILBUR BALL, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jursidictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdictions, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

ATTEST:

Sid J. White
Clerk Supreme Court.

cc: Hon. W. P. Carter
Hon. E. B. Leatherman
Hon. Milton E. Grusmark
Hon. Earl Faircloth
Hon. Jesse J. McCrary, Jr.

APPENDIX D
Transcript of Testimony Pages 637-638

A I said, "Put your clothes on and leave my house. My wife and I want to talk."

With that, the man who later turned out to be Nash, said, " I will take care of him."

He reached over to the side and came up with a revolver, and the first shot hit me in the stomach.

I said, "Please leave, I will explain this;" and he kept firing.

My left arm was shattered, and I knew at that point that I had to do something, and I drew my gun.

It seemed like 100 years I pulled that hammer back, and from then on I don't remember firing.

The next thing I knew I had to get help. I remember screaming at the door. I knew they were shot, because I was shot, and I knew I fired.

My next recollection, I was at the front door screaming for help. I knew I had to get help, because if I passed out, maybe everybody would die. I didn't know they were dead. I screamed as long as I could.

Finally, leaving the door open, in case no one did hear me someone may see the door open.

I went on the couch, and the next thing I know, the police officer came in. From there on--

The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, or any human being, shall be murder in the first degree and shall be punishable by death.

The penalty prescribed by law for the offense of murder in the first degree is death, unless a majority of the jurors recommend the defendant to the mercy of the Court, in which case the penalty for first degree murder is imprisonment for life in the State Penitentiary.

Murder in the second degree is the unlawful killing of a human being when perpetrated by an act imminently dangerous to another and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

I have just given you a definition of second degree murder in the language of the statute of this state. The main characteristic which distinguishes second degree murder from first degree murder is the absence of any premeditated design to take life. This does not mean necessarily the absence of any intention to kill, but the absence of a premeditated design to kill. A homicide caused by wanton or reckless act without intention to kill may be murder in the second degree where it was performed by a reckless and imminently dangerous act under circumstances indicating that the wrongdoer is of a depraved mind and is acting in disregard for the safety of human life.

Punishment for murder in the second degree is confinement in the State Prison for a period of from 20 years to life imprisonment, in the discretion of the Court.

Transcript of Testimony Pages 697-699

If, after having heard and carefully considered all of the evidence in the case, you have any reasonable doubt in your minds as to the defendant's guilt of any crime within the charge, then it will be your duty to acquit him. If, on the other hand, you are satisfied beyond such reasonable doubt as to his guilt, then it will be your duty to convict him of such crime as to which you are satisfied beyond a reasonable doubt, you being the sole judges of the testimony and the credibility of the witnesses.

Your verdict must be unanimous, that is, it must be the verdict of each and every juror, each juror being responsible for his own verdict, and you must concur before you can find any verdict in the case.

If you find the defendant, Robert Wilbur Ball, Sr., guilty of murder in the first degree of either or both of the indictments, the form of your verdict will be:

"We, the jury, find the defendant, Robert Wilbur Ball, Sr., guilty of murder in the first degree, as charged in the indictment. So say we all."

In a capital case such as this where the jury convicts a defendant of murder in the first degree, a majority of their number may recommend him to the mercy of the Court, and such recommendation reduces the punishment from death to life imprisonment. In the event you find the defendant guilty of murder in the first degree of either or both of the indictments, a majority of you recommend him to the mercy of the

Court, the form of your verdict shall be:

"We, the jury, find the defendant, Robert Wilbur Ball, Sr., guilty of murder in the first degree, as charged in the indictment. So say we all. And a majority of the jury recommend him to the mercy of the Court."

If you find the defendant guilty of murder in the second degree of either or both of the indictments, the form of your verdict will be:

"We, the jury, find the defendant, Robert Wilbur Ball, Sr., fuilty of murder in the second degree. So say we all."

If you find the defendant guilty of murder in the third degree of either or both of the indictments, the form of the verdict will be:

"We, the jury, find the defendant, Robert Wilbur Ball, Sr., guilty of murder in the third degree. So say we all."

If you find the defendant guilty of manslaughter of either or both of the indictments, the form of your verdict will be:

"We, the jury, find the defendant, Robert Wilbur Ball, Sr., guilty of manslaughter. So say we all."

If you find the defendant not guilty of either or both of the indictments, the form of your verdict will be:

"We, the jury, find the defendant, Robert Wilbur Ball, Sr., not guilty. So say we all."